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Attorney for Material Witnesses

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Hon. CATHY ANN BENCIVENGO

UNITED STATES OF AMERICA,	)	Case No. 07CR2531W
	)	Mag. No. 07MJ2362
Plaintiff,	)	
	)	MEMORANDUM OF POINTS AND
v.	)	AUTHORITIES IN SUPPORT
	)	OF VIDEOTAPE DEPOSITION
PADILLA, et. al.,	)	AND SUBSEQUENT VOLUNTARY
	)	DEPARTURE OF MATERIAL
	)	WITNESS
	)	DATE: November 29, 2007
	)	TIME: 9:30 A. M.
Defendant.	)	DEPT: BENCIVENGO
_____	)	

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BY STATUTE AND CASE LAW,  
THE MOTION SHOULD BE GRANTED

According to 18 U.S.C. 3144, "no material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition and if further detention is not necessary to prevent a failure of justice".

Furthermore, Fed. R. Crim. P. 15(a) specifies that a material witness may make a motion requesting such a deposition and the district court has the authority to order the taking of the

1 deposition and thereafter to discharge the detained witness from  
2 custody.

3 As the Fifth Circuit stated in Aguilar-Ayala v. Ruiz, 973 F.2d  
4 411 (1992) at page 413:

5 Read together, Rule 15(a) and section 3144 provide a  
6 detained witness with a mechanism for securing his own  
7 release. He must file a "written motion", Fed. R. Crim.  
8 P. 15(a), requesting that he be deposed. The motion must  
9 demonstrate that his "testimony can adequately be secured  
10 by deposition" and that "further detention is not  
11 necessary to prevent a failure of justice" 18 U.S.C.  
12 section 3144. Upon such showing, the district court must  
13 order his deposition and prompt release. Id. ("No  
14 material witness may be detained" if he makes such a  
15 showing). Although Rule 15(a) is couched in the  
16 permissive "May" not the mandatory "shall", Fed. R. Crim.  
17 P. 15(a) ("the court...may direct that the witness'  
18 deposition be taken"), it is clear from a conjunctive  
19 reading with section 3144 that the discretion to deny the  
20 motion is limited to those instances in which the  
21 deposition would not serve as an adequate substitute for  
22 the witness' live testimony: that a "failure of justice"  
23 would ensue were the witness released...**absent a "failure  
24 of justice", the witness must be released.**

25 This is also the law in the Ninth Circuit as demonstrated by  
26 the very recent case of Torres-Ruiz v. United States District Court  
27 for the Southern District of California, 120 F3d 933 (9<sup>th</sup> Cir 1997).  
28 The court "agreed with the reasoning of [Aguilar-Ayala, supra]" and  
reversed Judge Huff who had denied a motion for a deposition on  
facts virtually identical to the instant action . As the court  
stated:

29 In the instant case, two young men ages 19 and 22, have  
30 apparently been randomly selected out of a group of 27  
31 undocumented aliens and detained for a period of over 60  
32 days as material witnesses in a straightforward and  
33 uncomplicated alien smuggling prosecution. These young  
34 men state without opposition by either party to this case  
35 that they are the sole support for their respective  
36 families in Mexico, and that every day they remain in  
37 custody is a tremendous hardship on those family members.  
38 (Kilpatrick Declaration at 2) Neither petitioner is able  
to provide a surety for \$1000.00 bond. It is exactly  
circumstances such as these for which section 3144

1 appears to be designed.

2 Continued detention of the material witnesses after the video  
3 deposition is not necessary because the videotaped deposition  
4 itself is admissible evidence at trial, United States v. Canan 48  
5 F. 3d 954 (6<sup>th</sup> Cir. 1995) cert. denied 116 S. Ct. 716 (1996); United  
6 States v. Santos-Pinon 146 F 3d 734 (9<sup>th</sup> Cir. 1998).

7 Respectfully submitted,

8 DATED: November 15, 2007

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15 JONATHAN DAVID FRANK  
16 Attorney for Material Witness  
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